Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Telecommunications Relay Services and	)	
Speech-to-Speech Services for	)	CG Docket No. 03-123
Individuals with Hearing and Speech	)	
Disabilities	)	

MOTION TO DISMISS OF SORENSON COMMIJNICATIQNS, INC.

On May 18,2007, five competitors of Sorenson Communications, Inc. ("Sorenson") filed a Petition for Declaratory Ruling and Complaint ("Filing") asking the Commission to void a contractual provision in some of Sorenson's employment contracts.[1] As explained below, the Commission lacks jurisdiction to consider this request.' Sorenson therefore moves that the Commission summarily dismiss the Filing

---

[1] *See Petition for Declaratory Ruling and Complaint Concerning the Provision of Video Relay Service by Sorenson Communications, Inc.*, CG Docket 03-123, filed by Hands On Video Relay Services, Inc., CSDVRS, LLC, Snap Telecommunications, Inc., GoAmerica, Inc., and Communication Access Center for the Deaf and Hard of Hearing (May 18, 2007) ("Filing").

[2] The Filing parties also lack standing for at least two reasons. First, the only persons who conceivably could have standing would be one or more video interpreters who (i) formerly worked for Sorenson subject to an executed employment contract that contains the type of clause at issue here and (ii) allegedly suffered injury by virtue of that clause. Sorenson's rivals do not meet this description. Second, even if Sorenson's rivals somehow could be found to have standing, they have not made a sufficient showing in their Filing. For example, none of the Filing parties has alleged that it attempted to hire, without success, an identifiable former Sorenson interpreter who was subject to the relevant contractual clause. (The most that has been alleged is that one of Sorenson's competitors "had discussions with" Sorenson interpreters who "expressed . . . a desire to go to work" for that competitor. Filing, Declaration of Ronald E. Obray at 2.) Likewise, the Filing fails to attach an executed employment contract whose operation allegedly injured one or more of the Filing parties. Sorenson's rivals clearly lack standing to assert speculative claims on behalf of unidentified former Sorenson interpreters who may or

and spare all parties, as well as the Commission itself, the unnecessary expense and burden that would otherwise result. At a minimum, the Commission should dismiss the complaint component of the Filing because it is procedurally defective and because it fails to identify a violation of any FCC rule.[3]

I. THE COMMISSION SHOULD DISMISS THE FILING IN ITS ENTIRETY

The Filing focuses on a particular contractual provision that allegedly appears in an employment agreement between Sorenson and some of the interpreters it hires to handle video relay service ("VRS") calls. The provision generally states that for a period of one year after an interpreter ceases to be employed at Sorenson, the interpreter will not work for any other VRS provider within the same state where the interpreter previously worked for Sorenson. The provision does not impose any restrictions on the interpreter's ability to provide interpreting services for entities other than VRS providers. In fact, the contract expressly authorizes former Sorenson interpreters to work for agencies that provide community interpreting.

The type of provision at issue here – commonly called a "non-compete" clause – has long been a staple of private employment contracts, and state courts around the country have found such clauses to be legal for a wide range of professions. Sorenson is confident that its employment agreements are lawful and would withstand scrutiny by any court of competent jurisdiction. The Commission, however, lacks authority to rule

---

may not have signed certain employment contracts or suffered any injury by virtue of those contracts.

[3] Should the Commission decide not to dismiss the Petition, Sorenson asks that the Commission place it on public notice to afford Sorenson the opportunity to refute the Petition's various ill-founded substantive claims. Should the Commission decide not to dismiss the Complaint, Sorenson will file an answer "within the time specified by the Commission," in accord with the Commission's rules. 47 C.F.R. § 64.604(c)(6)(v)(3).

on the lawfulness of the contractual provision in question. As the Commission has repeatedly held, its jurisdiction does not extend to matters that "revolve around questions of state law and private contracts, matters which the Commission historically and consistently has left to local courts of appropriate jurisdiction."[4] Based on this principle, the Commission has refused to assert jurisdiction over a range of issues involving private employment contracts in general and over issues concerning "non-compete" clauses in particular.[5]

Ignoring these clear precedents, Sorenson's rivals insist the FCC should consider their Filing.[6] Each of the statutory provisions cited by the Filers in support of their position is plainly inapplicable, however. The first provision cited by Sorenson's

---

4 *See, e.g., Applications of Northwest Broadcasting, Inc., Assignor, and Western Pacific, Inc., Assignee,* Memorandum Opinion and Order, 12 FCC Rcd 3289, ¶ 10 (1997) (citations omitted); *see also Applications of WWC Holding Co, Inc. and RCC Minnesota, Inc.*, Memorandum Opinion and Order, DA 07-1557, 2007 FCC LEXIS 2576, ¶ 16 (WTB, rel. March 30, 2007) ("The Commission has repeatedly held that private disputes and contractual matters should be resolved by a tribunal of competent jurisdiction.") (citations omitted); *Applications of Wireless US, LLC, Assignor, Nextel of California, Inc., Assignee,* Order, DA 07-2039, 2007 FCC LEXIS 3749, ¶ 10 (WTB, rel. May 9, 2007) (same). The Commission also has repeatedly stated that it will "not ordinarily act on matters resulting from private contracts," but instead will "defer to a court of competent jurisdiction." *Northwest* ¶ 10; *WWC Holding* ¶ 16; *Wireless US* ¶ 10.

5 *See, e.g., Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Miramar Beach, Florida),* Report and Order, 6 FCC Rcd 5778, ¶ 4 n.4 (Allocations Branch 1991) ("We will not reach the arguments concerning the 'non-compete agreement.' This is a private agreement between the parties and is not a matter for Commission review."); *Applications of Shareholders of American Radio Systems Corporation, Transferor and CBS Corporation, Transferee,* Memorandum Opinion and Order, 13 FCC Rcd 12430, ¶ 4 n.2 (MMB 1998) ("the employment contract disputes [had been found to be] matters outside the Commission's regulatory jurisdiction"); *Applications of Clarklift of San Jose, Inc. and Moore Material Handling Group,* Order on Further Reconsideration, 16 FCC Rcd 920, ¶ 6 (WTB 2001) ("a determination concerning whether the actions of the office manager were within the scope of his employment [had been found to be] outside the Commission's jurisdiction, and was appropriate for a court of competent jurisdiction.").

6 *See* Filing at 24-31.

competitors, section 201(b), applies only to "common carriers" – *i.e.*, providers of telecommunications services.[7] As Sorenson has previously explained, it is not a common carrier, nor does it offer any common carrier services.[8] Moreover, the Commission has expressly found that "TRS providers do not provide telecommunications services" and "are not telecommunications carriers."[9] Accordingly, section 201(b) does not apply.

Contrary to the Filers' claims, section 225 of the Act also fails to confer jurisdiction. No provision in section 225 expressly mentions, or implicitly covers, private employment contracts, and, *afortiori,* no provision authorizes the Commission to determine the legality of such contracts. In the absence of a clear statutory conferral of jurisdiction, the Commission must adhere to its well-established policy that private contractual matters are outside its jurisdiction.

Finally, section 2(a) does not provide the Commission with ancillary jurisdiction, as Filers claim. As courts have found, ancillary jurisdiction exists only if: (i) the subject of the proposed regulation is covered by the FCC's general grant of jurisdiction under Title I of the Act, and (ii) the subject of the regulation is "reasonably ancillary" to the FCC's effective performance of its statutorily mandated responsibilities." Section 2(a)

---

7 *See* 47 U.S.C. $201; *see also* 47 U.S.C. § 153(44); 47 U.S.C. § 153(10).

8 *See* Sorenson White Paper, "Regulating VRS Hardware and Software Is Contrary to the Intent of Section 225 and to the Interests of the Deaf Community" at 27 (Jan. 6, 2006), filed with *exparte* letter from Gil M. Strobel, counsel to Sorenson, to Marlene H. Dortch, FCC, CG Docket 03-123 (Jan. 6,2006).

9 *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities,* Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 5140, ¶ 81 (2000).

10 *United States v. Southwestern Cable Co.,* 392 U.S. 157, 178 (1968); *American Library Ass'n v. FCC,* 406 F.3d 689,700 (D.C. Cir. 2005).

does not cover clauses in private employment contracts.[11] In fact, Title I generally confers subject matter jurisdiction over activities that involve the "process of radio or wire transmission."[12] The non-compete clause at issue here does not involve that process. Moreover, voiding the private employment contracts of VRS providers is not "reasonably ancillary" to the FCC's effective performance of its statutory duties. The Filing therefore fails to satisfy both of the prerequisites for the lawful assertion of ancillary jurisdiction.

Remarkably, the Filing fails to mention that one of the main precedents it touts as evidence of the Commission's broad ancillary authority – the *Broadcast Flag Order* – was reversed and vacated by the Court of Appeals for the District of Columbia.[13] The Court of Appeals, after conducting an exhaustive analysis of the FCC's Title I subject matter jurisdiction, found that the Commission had relied on an overly expansive

---

11 *See* 47 U.S.C. § 152(a).

12 *American Library*, 406 F.3d at 691, 700, 703,705, 706, 707, 708; *see also id.* at 702 ("the Commission may not invoke its ancillary jurisdiction under Title I to regulate matters outside of the compass of communication by wire or radio"). The Filing parties claim that section 2(a) "extends the jurisdiction of the Commission to all persons engaged in interstate and or [sic] foreign communication by wire or radio." Filing at 25. This claim betrays an apparent ignorance of the distinction between personal and subject matter jurisdiction. While section 2(a) grants the FCC personal jurisdiction over the individuals identified by the Filing parties, it does not confer subject matter jurisdiction over all activities undertaken by those persons. For example, although the Commission has personal jurisdiction over a video interpreter employed by a VRS provider, the Commission has no subject matter jurisdiction to regulate activities undertaken by the interpreter that do not involve communication by wire or radio. The Commission thus lacks jurisdiction to regulate the food the interpreter purchases at the grocery, the type of car the interpreter drives, or, more pointedly, the employment contract the interpreter chooses to enter into.

13 *See* Filing at 29-30 (summarizing and citing *Digital Broadcast Content Protection*, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 23550, 30 Comm. Reg. (P & F) 1189 (2003) *("Broadcast Flag Order")*, but omitting subsequent history); *see also American Library*, 406 F.3d at 708 (reversing and vacating *Broadcast Flag Order* because its assertion of ancillary jurisdiction was overly broad).

interpretation of that jurisdiction to support its assertion of ancillary jurisdiction. Notwithstanding this holding, the Filing parties now urge the Commission to embrace the very interpretation of ancillary jurisdiction that the Court of Appeals struck down as unlawful. The Commission should not flout the Court's authority in the way the Filing parties suggest.

In the absence of any jurisdictional basis to consider the lawfulness of a clause in a private employment contract, the Commission should summarily dismiss the Filing in its entirety. Failure to dismiss the Filing would result in a waste of the Commission's resources and would reward the transparent efforts of Sorenson's competitors to use the regulatory process to advance their business interests. The Filing parties should not be allowed to gain through extra-jurisdictional regulatory fiat what they have been unable to achieve through fair competition.

II. AT A MINIMUM, THE COMMISSION SHOULD DISMISS THE COMPLAINT COMPONENT OF THE FILING

The Filing purports to consist of both a petition for declaratory ruling and "a complaint against Sorenson . . . pursuant to Section 225" of the Act.[14] Should the FCC opt not to dismiss the Filing in its entirety, the Commission should at least dismiss the "complaint" and permit the Filing to proceed only as a petition for declaratory ruling.[15]

Dismissal of the complaint is warranted because the Filing nowhere identifies a clear FCC rule that Sorenson allegedly violated. As courts have held, a regulated party

---

[14] Filing at 1.

[15] In addition, the Filing appears to be procedurally defective, ignoring the rules concerning informal complaints. For example, it is not proper to file a complaint in the public docket of an ongoing rulemaking proceeding. If, however, the FCC were to decide to allow the complaint to proceed as an informal complaint under section 225, it should, at a minimum, forward a copy of the "complaint" to Sorenson's designated agent and allow Sorenson at least thirty days to respond.

may not be penalized unless that party "would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform."[16] Here, the Filing does not identify *any* FCC rule that clearly prohibits the kind of contractual clause at issue in the Filing. The fact that the Filing seeks a Declaratory Ruling that the contractual provisions in question "are void as contrary to the public interest/public policy" is a clear indication that the Filing parties are not aware of any existing rule that Sorenson has violated.[17] In the absence of such a rule, the Commission may not allow the complaint to proceed; instead, the Commission should, at most, consider the Filing as a petition that seeks prospective declaratory relief.

111. CONCLUSION

For the foregoing reasons, the Commission should grant this Motion and dismiss the Filing in its entirety or, at a minimum, permit the Filing to proceed only as a petition for declaratory ruling.

Respectfully submitted,

/s/ Ruth Milkman

Ruth Milkman
Gil M. Strobe1
Richard D. Mallen
Lawler, Metzger, Milkman & Keeney, LLC
2001 K Street NW, Suite 802
Washington, DC 20006
(202) 777-7700
gstrobel@lmmk.com

Michael D. Maddix
Regulatory Affairs Manager
Sorenson Communications, Inc.
4393 South Riverboat Road
Suite 300
Salt Lake City, Utah 84123

May 29,2007

[16] *Trinity Broad. Of Fla., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) (citation and internal quotation marks omitted).

[17] Filing at 1.

CERTIFICATE OF SERVICE

I, Claudia Del Casino, hereby certify that the foregoing "Motion to Dismiss" was served this 29th day of May, 2007 by, unless otherwise noted, depositing true copies thereof with the United States Postal Service, first class postage prepaid, addressed as follows:

Cathy Seidel*
Consumer & Governmental Affairs Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Tom Chandler*
Consumer & Governmental Affairs Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Jay Keithley*
Consumer & Governmental Affairs Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Greg Hlibok*
Consumer & Governmental Affairs Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Pam Slipakoff*
Consumer & Governmental Affairs Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Dan Luis, CEO
Go America, Inc.
433 Hackensack Avenue (3rd Floor)
Hackensack, NJ 07601

George L. Lyon, Jr.
Lukas, Nace, Gutierrez & Sachs, Chartered
1650 Tyson's Blvd., Suite 1500
McLean, VA 22101
Counsel for Hands on Video Relay Services, Inc.

Kelby Brick
Director Legal and Regulatory Affairs
Hands on Services, Inc.
c/o George L. Lyon, Jr.
Lukas, Nace, Gutierrez & Sachs, Chartered
1650 Tyson's Blvd., Suite 1500
McLean, VA 22101

Mathew Krieger, CFO
Snap Telecommunications, Inc.
1 Blue Hill Plaza
P.O. Box 1626
Pearl River, NY 10965

Julie A. Miron, CAE
Executive Director
Communication Access Center for The Deaf and Hard of Hearing
1631 Miller Road
Flint, MI 48503-4720

Sean Belanger, CEO
CSDVRS, LLC
600 Cleveland Street, Suite 1000
Clearwater, FL *33755*

*Via Email

/s/ Claudia Del Casino
Claudia Del Casino